FILE COPY

Supreme Court, U. S.
FILED
NOV 28 1972
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term 1972

72-788

JOSEPH GERNIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

H. ELLIOT WALES
Attorney for Petitioner Joseph Gernie
299 Broadway
New York, New York 10007
227-3830

(5328) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Issues Involved	2
Preliminary Statement	3
Reasons for Granting the Writ	5
Conclusion	10

Table of Citations

CASES CITED:

Dwares v. Clifton Yarn Mills, 65 R.I. 471, 16 A.2d 501, 595 (1940) 5, 7

People v. Bateman, 57 Cal. App. 2d 585, 135 P.2d 192 (1943) 5, 7

Walton v. Sherwin Williams Company, 191 F.2d 277, 284-286 7

United States v. DeLoach, 307 F.2d 653 . . 2, 7

United States v. Pope, 289 F.2d 312 . . . 2, 8, 9

Index

Page

STATUTES CITED:

21 U.S. C. §§ 173, 174 1

28 U.S.C. §1254(1) 2

Rule Cited:

Proposed Rules of Evidence, Rule 901 . . . 9

OTHER AUTHORITIES CITED:

United States Constitution:

Fifth Amendment 2

Sixth Amendment 2

J. Wigmore, Evidence, Sec. 1955 (3rd Ed. 1940) 5

Appendix

Opinion 1a

In The

Supreme Court of the United States

JOSEPH GERNIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner JOSEPH GERNIE petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered October 4, 1972, and the denial of the petition for rehearing, entered October 30, 1972. Docket No. 72-1335.

The judgment affirmed the conviction for conspiracy to traffic in cocaine (21 U.S.C. §§173, 174), after a jury trial in the Eastern District of New York (No. 71 CR 874).

Opinion Below

The opinion of the Court of Appeals, not yet reported, is set forth as Appendix A.

Jurisdiction

The jurisdiction of this Court to review the judgment of the Court of Appeals is authorized by 28 U.S.C. §1254 (1).

Constitutional Provisions Involved

This petition relates to the Sixth Amendment right to trial by jury and the Fifth Amendment right to due process.

Issues Involved

Should this Court resolve the conflict between the Eighth Circuit (Walton v. Sherwin-Williams Company, 191 F.2d 277, 284-286) and the District of Columbia Circuit (United States v. DeLoach, 307 F.2d 653) on the one hand, and the Second Circuit in this case, as to the propriety of "expert testimony" on the meaning of ordinary words?

Did the Court of Appeals err, contrary to the right of a defendant to have all issues of fact resolved by a jury, when it permitted expert testimony as to the meaning of the words "Twenty cents off"?

Should this Court resolve the conflict between the Ninth Circuit (United States v. Pope, 289 F.2d 312) and the Second Circuit in this case, as to the quantum of evidence necessary to establish a foundation before testimony as to voice identification can be received?

Did the Court of Appeals err when it allowed evidence as to voice identification, when the trial record does not show that the witness ever heard the defendant's voice, except on the telephone tap in question?

Preliminary Statement

Petitioner was convicted with numerous other defendants of conspiracy to import and traffic in cocaine from Chile in 1970. Specifically Gernie was charged with agreeing to purchase one batch of cocaine from Enrique Hernandez in October 1970.

The government investigators had been tapping the telephone of Enrique Hernandez for a period of time. He had been suspected of dealing with others (not Gernie) in drugs. Three conversations — September 28, October 13, and October 29 — were tapped, and received into evidence. The Court of Appeals affirmed the jury finding that the person to whom Hernandez was speaking was petitioner Gernie, though the Court noted "at the time of these calls, Detective Cruet had not met appellant. He claimed on a voire dire examination however to have heard Gernie's voice in subsequent conversations, other conversations." The Court of Appeals continued:

> "He also met appellant, although it was after the three telephone conversations in question; while we do not know the circumstances of the meeting, it is a little difficult to imagine how two people can meet with one not talking. Cruet re-

> called specifically one telephone call placed by Enrique Hernandez to a club in Manhattan in which 'he asks for the person, Joe Gernie, and Joe Gernie gets on the phone.' The court overruled appellant's objections that no foundation for the voice identification had been laid and specifically asked Detective Cruet, 'Do you recognize the defendant Joe Gernie's voice as the voice that you have marked 'Joe' or 'Joe Gernie' on (Government Exhibit) 18 for identification,' to which an affirmative reply was received. The court left it to the jury to determine the witness's credibility. While the foundation was weak, a voice can be identified through subsequent acquaintanceship with it, which Cruet professed to have through a 'meeting' and other tapped calls, including one specifically asking for Gernie by name."

At the trial detective Cruet, the investigator in this case, was permitted to give his own personal interpretation of the Hernandez-Gernie telephone conversation. The investigator was allowed to testify that when Hernandez stated "I'm supposed to have twenty, twenty cents coming off", it meant to him that the speaker "was supposed to be getting 20 kilos of narcotics". See foot note 4 of the court opinion.

In this regard the Court of Appeals wrote:

> "It was proper to permit Detective Cruet to testify concerning the narcotics vernacular used in the telephone conversations.

> The objection was not that the officer was unqualified by lack of experience or objectivity to give an opinion, but that opinion testimony should not be received on the meaning of words used in the conversations. This objection is unavailing. See PEOPLE v. BATEMAN, 57 Cal. App.2d 585, 135 P. 2d 192 (1943) ('the testimony of a duly qualified expert. . . is admissible to explain the significance of cryptic letters and figures which appear upon paper, books, and paraphernalia customarily used by bookmakers'); DWARES v. CLIFTON YARN MILLS, 65 R.I. 471, 16 A.2d 501, 595 (1940); J. Wigmore, Evidence Sec. 1955 (3rd ed. 1940)."

Reasons for Granting the Writ

The opinion of the Court of Appeals authorizing the investigating detective to give his own personal opinion of the meaning of a tapped telephone conversation invades the exclusive province of the jury to make his own findings and conclusions from the evidence itself, and not be burdened and prejudiced by the personal interpretation of one of the prosecutor's investigators.

The investigator was not a party to the conversation — he merely overheard it on the telephone tap. Joseph Gernie was not known to him at the time. He had been investigating the Hernandez brothers and others. It was not until some time later that he heard who Joseph Gernie was. The detective had no knowledge of the Gernie — Hernandez relationship. He suspected Hernandez

was dealing in drugs — that is why he was investigating. He had no such thoughts about Gernie, who was not even known to him. He did not know whether the Gernie-Hernandez relationship was innocent or criminal. He had no idea of the context or background of the Gernie-Hernandez relationship. To be sure the telephone conversations were ambiguous in tone — narcotic language was not used, nor were any of the terms of the subculture employed. Nevertheless the investigator was permitted to tell the jury of his own personal opinion — "twenty cents off" meant "twenty kilos of narcotics." Little wonder the jury convicted after hearing that testimony. All of the hunches and suspicions of the investigator were incorporated in that answer.

It was impossible for the jury to cast aside such personal opinions from the prosecution's own investigator. Its impact was potent.

The jury should not be exposed to "expert testimony" interpreting evidence, unless such terms to be interpreted are recognized words of art, business, science, or the subculture. While "stuff", "horse", and "K" have recognized meanings within the subculture of narcotics, the terms "twenty cents off" has no such meaning. It could be utilized within the context of any illicit dealing (stolen securities, counterfeit money) or within the realm of the open market place.

It remains the exclusive province of the jury to evaluate and interpret the evidence. It is not the function of the prosecution (or even the defense) to interpret the evidence by other evidence.

It is for the jury alone to evaluate the plain meaning of the words used in conversation. By allowing the prosecutor's investigator to interpret the evidence, the Court infringed upon the defendant's right to have his conduct judged by the jury, as mandated by the Sixth Amendment.

The opinion of the Court of Appeals cites cases in which recognized words of art were used — People v. Bateman, 135 P.2d 192 and Dwares v. Clifton Yarn Mills, 16 A.2d 501, 505. The Court ignored the opinion of the Eighth Circuit, Walton v. Sherwin-Williams Company, 191 F.2d 277, 284-286, and the opinion of the District of Columbia Circuit, United States v. De Loach, 307 F.2d 653 (opinion by then Circuit Judge Warren Burger).

In De Loach, the robbery conviction was reversed because of the faulty manner in which the prosecution witnesses testified — they summarized what others said, and gave their own conclusions. The District of Columbia Circuit wrote: "The conclusion or interpretation of a witness as to the meaning of what someone said is not admissible." (307 F.2d at 655). It is for the jury, not the witness, to interpret and conclude what a defendant meant by what he said. The function of a witness is limited — "the witness should be required to state what was actually said" (307 F.2d at 655).

In Walton v. Sherwin-Williams Company, 191 F.2d 277, 284-286, the Eighth Circuit stated an expert may properly testify only if the matter in question is outside the knowledge of the jury,

and beyond the scope of lay experience and competence. In holding the offered evidence inadmissible, the Eighth Circuit stated it was "purely a question of the meaning of words in the English language", (191 F.2d at 286).

As such it is in order for this Court to resolve the conflict between the District of Columbia and Eighth Circuits on the one hand, and the Second Circuit on the other hand.

The opinion of the Court of Appeals in this case sustaining the evidence as to voice identification is in conflict with the opinion of the Ninth Circuit in United States v. Pope, 289 F.312, 315 (CA-9, 1923).

In our case Detective Cruet had never met (or heard of) Gernie at the time of the conversations in question. He testified that much later he "met" Gernie, though the opinion of the Court of Appeals concedes there was no evidence Gernie and the detective conversed when they met — "while we do not know the circumstances of the meeting, it is a little difficult to imagine how two people can meet with one not talking". The Court of Appeals resolved this dilemma by writing — "while the foundation was weak" — "the court left it to the jury to determine the witness's credibility."[1]

1. In its brief to the United States Court of Appeals (page 40), the United States Attorney conceded that the record did not establish any further conversations, or evidence of voice indentification — ". . . the record also shows that Detective Cruet had met Gernie (1182) although the circumstances of the meetings are not given."

"Nevertheless, if appellant insists upon pressing this point the Government has no objection to a hearing. . . ."

In contrast, in Pope (289 F. 312), the Ninth Circuit did not leave a weak foundation for the jury, but instead reversed the bootlegging conviction of Freda Pope because of insufficient evidence. The Court held the identification of Freda as the speaker on the phone was inadequate. A detective testified he spoke by phone with one purporting to be Freda — however "the detective was not acquainted with Freda, had never seen her, and did not know her voice" (289 F. at 315). All he could say was — "they said it was Freda." Later the detective went to the hotel to purchase liquor, and he asked for Freda. A female's voice from the back said she was busy. The Court held — "Clearly this evidence, without more, proves nothing."

Rule 901 of the Proposed Rules of Evidence for the United States Courts, and the advisory committee notes, especially dealing with examples No. 5 and 6, states the general principal of law (51 FRD 315, 447-452). Voice identification requires that a witness hear the voice at some time under circumstances "connecting it with the speaker" (51 FRD at 448).

As such it is in order for this Court to resolve the conflict between the Second Circuit and the Ninth Circuit.

Conclusion

It is requested that the petition be granted.

Respectfully submitted,

H. ELLIOT WALES
Attorney for Petitioner
299 Broadway
New York, N.Y. 10007

November 22, 1972

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 878, 879, 880, 881, 899—September Term, 1971.

(Argued July 17, 1972 Decided October 4, 1972.)

Docket Nos. 72-1335, 72-1336, 72-1432,
72-1440, 72-1519, 72-1529

UNITED STATES OF AMERICA,

Appellee,

v.

EDUARDO BORRONE-IGLAR, MADELINE PINEDA, AGAPITO GU-LEON, VICTOR HERNANDEZ, MARTIN HERNANDEZ, ENRIQUE HERNANDEZ, JOSEPH GERNIE and JAMES MILLER,

Appellants.

Before:

FEINBERG, MULLIGAN and OAKES,

Circuit Judges.

Appeal from a judgment of conviction entered after a jury trial in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* for conspiring to smuggle and traffic in cocaine, in violation of 21 U.S.C. §§ 173, 174.

Affirmed.

H. ELLIOT WALES, New York, New York, *for Appellant Joseph Gernie.*

Opinion

PETER R. SCHLAM, Assistant United States Attorney, Brooklyn, New York (Robert A. Morse, United States Attorney for the Eastern District of New York, David G. Trager, Assistant United States Attorney, on the brief), *for Appellee.*

PER CURIAM:

Appellant Joseph Gernie is one of several defendants[1] convicted in connection with the smuggling of 21 kilograms of cocaine on September 6-7, 1970, and 40 kilograms on November 5-6, 1970, into the United States by way of the Chilean ship "Maipo," with the use of skin divers between a Brooklyn pier and the ship, followed by sale and resale. Appellant specifically was convicted of conspiracy to smuggle and traffic in cocaine, contrary to 21 U.S.C. §§ 173, 174, and was sentenced to 15 years' imprisonment and a $20,000 fine. Appellant's alleged role in the conspiracy was as a major customer of the Hernandez brothers, who were the initial American purchasers of the smuggled cocaine.

Appellant's principal point is that the trial court erred in permitting an in-court voice identification of him by New York City Detective Frank Cruet, who was monitoring defendant Enrique Hernandez' telephone pursuant to a state court order. Appellant also urges that it was error to permit the detective to give his interpretation of the argot used in the Hernandez-Gernie telephone conversations; that there was insufficient evidence as a matter of law to establish appellant as a member of the conspiracy; and that the trial court erred in reserving decision on a

---

1 The appeal of appellant Borrone-Iglar was dismissed on motion; as to the other appellants the judgments were affirmed in open court.

motion for judgment of acquittal until the day of sentencing.

We take up the telephone tap question first. The three conversations in question were on September 28, October 13, and October 29, 1970. At the time of these calls Detective Cruet had not met appellant. He claimed on a voir dire examination, however, to have heard Gernie's voice in "[s]ubsequent conversations, other conversations." He also met appellant, although it was after the three telephone conversations in question; while we do not know the circumstances of the meeting, it is a little difficult to imagine how two people can meet with one not talking. Cruet recalled specifically one telephone call placed by Enrique Hernandez to a club in Manhattan in which "he asks for the person, Joe Gernie, and Joe Gernie gets on the phone." The court overruled appellant's objections that no foundation for the voice identification had been laid and specifically asked Detective Cruet, "Do you recognize the defendant Joe Gernie's voice as the voice that you have marked 'Joe' or 'Joe Gernie' on [Government Exhibit] 18 for identification," to which an affirmative reply was received. The court left it to the jury to determine the witness's credibility.

While the foundation was weak, a voice can be identified through subsequent acquaintanceship with it, which Cruet professed to have through a "meeting" and other tapped calls, including one specifically asking for Gernie by name.[2] Weighing the testimony was a job for the jury. *See generally NLRB* v. *Carpet Layers Local 419*, 213 F.2d 49, 52 (10th Cir. 1954).[3]

---

2 At argument the court was furnished copies of the transcript of tapped conversations in evidence, but this call was not one of them.

3 Even if there were error in the original admission of the in-court voice identification, however, it could be argued that the error was cured by subsequent evidence at trial. In the questioned conversation

Opinion

It was proper to permit Detective Cruet to testify concerning the narcotics vernacular[4] used in the telephone conversations. The objection was not that the officer was unqualified by lack of experience or objectivity to give an opinion, but that opinion testimony should not be received on the meaning of words used in the conversations. This objection is unavailing. *See People* v. *Bateman*, 57 Cal. App. 2d 585, 135 P.2d 192 (1943) ("the testimony of a duly qualified expert . . . is admissible to explain the significance of cryptic letters and figures which appear upon paper, books, and paraphernalia customarily used by bookmakers"); *Dwares* v. *Clifton Yarn Mills*, 65 R.I. 471, 16 A.2d 501, 505 (1940); J. Wigmore, Evidence § 1955 (3rd ed. 1940).

With the conversations in evidence and the interpretation of them by the narcotics detective permissible, there is sufficient evidence of Gernie's participation in the smuggling of November 5-6, as a purchaser from Enrique Hernandez, to justify his conviction, without detailing the conversations under which news of the "Maipo's" pending arrival with the contraband was related to Gernie, whom Enrique Hernandez told him was "the first one" that he would call.

---

of October 29, 1970, Enrique Hernandez asked the person whom Cruet testified he recognized as Gernie to get Enrique Hernandez' nephew a job, and Gernie said, "Alright [sic]. We'll work on it this week." The defense subsequently called the nephew, who verified that Gernie had obtained a job for him, seeking thereby to establish the telephone conversation as innocent but substantiating its authenticity and the accuracy of Cruet's identification. *Cf. United States* v. *Volkell*, 251 F.2d 333, 337 (2d Cir.), *cert. denied*, 356 U.S. 962 (1958); *Skiskowski* v. *United States*, 158 F.2d 177, 180-82 (D.C. Cir. 1946), *cert. denied*, 330 U.S. 822 (1947). *But cf. United States* v. *Modern Reed & Rattan Co.*, 159 F.2d 656 (2d Cir.), *cert. denied*, 331 U.S. 831 (1947).

4 *E.g.*, "I'm supposed to have twenty, twenty cents coming off," means, according to Detective Cruet, that the speaker (Enrique Hernandez) was supposed to be getting 20 kilos of narcotics.

Finally, Gernie contends that the trial judge improperly reserved decision on Gernie's various motions for judgment of acquittal. The first of these was made at the end of the Government's case. While ruling on the motion promptly would have been the "better practice," the judge's failure to do so was not reversible error in view of Gernie's subsequent introduction of evidence. *See United States* v. *Brown*, 456 F.2d 293 (2d Cir.), *cert. denied*, —— U.S. —— (1972). *But see Sullivan* v. *United States*, 414 F.2d 714, 715 (9th Cir. 1969). As to the motions made at the close of all the evidence and after verdict, the judge was plainly entitled to reserve decision under Fed. R. Crim. P. 29(b) and (c). What this court suggested was bad procedure in *United States* v. *Fincke*, 437 F.2d 856, 862 (2d Cir.), *cert. denied*, 402 U.S. 995 (1971), was withholding decision until after summation and then granting the motion as to one defendant, in view of the possibility that had the motion been granted before argument the summations of the other defendants might have been different. Here there was clearly no prejudice.

Judgment affirmed.

Order

72-1335-36, 72-1432,
72-1440, 72-1519, 72-1529

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of October, one thousand nine hundred and seventy-two

Present: HON. WILFRED FEINBERG
HON. WILLIAM HUGHES MULLIGAN
HON. JAMES L. OAKES
Circuit Judges.

- -x

United States of America,

Plaintiff-Appellee,

v.

Nicodemus Olate-Romero, Justo Quintanilla, a/k/a Arnaldo, Luis Carol Otey-Ampuero, Eduardo Borrone-Iglar, Amanda Ramirez, Madelaine Pineda, Agapito Gu-Leon, Victor Hernandez, Martin Hernandez, Enrique Hernandez, Joseph Gernie, James Miller, a/k/a Pluggie, Manuel Figueroa-Milla, a/k/a Pajarito, Manuel Brito Salinas, a/k/a John Doe,

Defendants,

Order

Eduardo Borrone-Iglar, Madelaine Pineda, Victor Hernandez, Martin Hernandez, Enrique Hernandez, Joseph Gernie, Agapito Gu-Leon, James Miller,

Defendants-Appellants.

- -x

A petition for a rehearing having been filed herein by counsel for the appellant, Joseph Gernie,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk